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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL PENA et al., Defendants and Appellants.	B227124 (Los Angeles County Super. Ct. No. KA085239)

APPEAL from judgments of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant Michael Pena.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant Richard Eugene Renteria.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Michael Pena and Richard Eugene Renteria appeal from the judgments entered following their convictions by juries on count 1 – first degree murder (Pen. Code, § 187, subd. (a))[1] and on two counts of willful, deliberate, and premeditated attempted murder (counts 2 & 3) with findings as to all counts appellants personally, and a principal, used a firearm (former § 12022.53, subds. (b) & (e)(1)), intentionally discharged a firearm (former § 12022.53, subds. (c) & (e)(1)), intentionally discharged a firearm causing great bodily injury and death (former § 12022.53, subds. (d) & (e)(1)), and committed the offenses for the benefit of a criminal street gang (former Pen. Code, § 186.22, subd. (b)(4)). The court sentenced Pena to prison for 115 years to life, and sentenced Renteria to prison for 100 years to life. We affirm the judgments.

FACTUAL SUMMARY

1. *People's Evidence.*

a. *Evidence Presented to Appellants' Juries*.[2]

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that prior to August 29, 2008, the Flores gang (Flores) shot Pena in the leg. As a result, he used a prosthetic leg. Pena was a member of the Blackwood Puente gang (Blackwood) and the two gangs were rivals. Los Angeles County Sheriff's Deputy Ron Duval, a gang expert, testified that if a Flores member shot a Blackwood member, Blackwood would be expected to retaliate by entering Flores's territory and looking for a Flores member to shoot. The Blackwood member who had been shot would participate to reestablish himself in Blackwood. Pena's moniker was Dopey.

On August 29, 2008, Lena Ojinaga was at her apartment at 3647 Durfee in El Monte. According to Ojinaga, Flores was the predominant gang in El Monte. About 8:00 or 9:00 p.m., Pena arrived at Ojinaga's apartment with some of his family members.

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[1] Unless otherwise indicated, subsequent statutory references are to the Penal Code.

[2] Appellants were jointly tried except they had separate juries.

Ojinaga had known Pena for years. Pena's group was going to Hollywood after visiting Ojinaga.

Vincent Maldonado was in Ojinaga's apartment when Pena's group was there. Maldonado was preparing to leave but not with Pena's group. Pena's group visited for about 20 minutes, then left.

About 30 to 45 minutes after Pena's group left, Alfredo Delgado, Ojinaga's boyfriend, arrived. Delgado was a Flores member whose moniker was Cougar. After Delgado arrived, he kept company with Jackie Vargas (the decedent) and Mario Ortiz. Ortiz was a Flores member and told a detective that Vargas was "part of" Flores.

Probably about 10:00 p.m., and perhaps an hour after Delgado arrived, Tricia Nishijima, an acquaintance of Ojinaga, arrived to pick up Maldonado. Nishijima had met Delgado. The father of Nishijima's daughter, as well as Renteria, were Blackwood members. Nishijima was a close friend of Renteria and knew Pena.

Renteria's moniker was Bush or Bushy. Renteria's father was a Blackwood "shot-caller." Renteria conveyed to Blackwood members the directives of shot-callers.

Nishijima testified that after she arrived at Ojinaga's apartment, Ojinaga told her that appellants had been there and would return after they left Hollywood. Nishijima was concerned about Renteria returning because several Flores members were there. Pena had told Nishijima that he had been shot by Flores members. Nishijima and Maldonado left together in a car about ten minutes after Nishijima arrived.

Maldonado told police that while Nishijima was in the car, she spoke to someone on the phone, saying, " 'You guys, you just missed them,' " and " 'You guys just left and these guys from Flores just rolled up right after you guys.' "[3] Maldonado expressed anger at Nishijima for making that call.

About 30 to 45 minutes after Nishijima and Maldonado left, Vargas, Delgado, and Ortiz left in a Honda. Ortiz testified Vargas was driving. The three traveled a short

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[3] On December 4, 2008, Nishijima was arrested. She was charged with appellants but testified she pled guilty to "245," i.e., "assault," prior to appellants' trial.

distance and Ortiz heard four or five gunshots. Los Angeles County Sheriff's Detective Richard Biddle testified Ortiz told Biddle that about 11:30 p.m., a vehicle, which Ortiz ultimately described as a white truck, pulled alongside the driver's side of the Honda. The truck's passenger window was down, people in the truck asked the three in the Honda where they were from, and one of the truck's occupants shot at the three. Vargas was shot in the chest and mortally wounded. Delgado denied any of the three had a gun. Nishijima testified that hours after the shooting, Maldonado called her and angrily told her someone had been shot in front of Ojinaga's house because of Nishijima's phone call.

Desiree Castaneda testified she lived at 4110 Durfee in El Monte. Shortly after 11:00 p.m. that night, she heard at least five gunshots very near her home. She later looked out her front door and saw a Honda and white truck driving side by side. The Honda stopped in the street but the truck continued and eventually parked. Castaneda heard a truck occupant say, "Identify yourselves. Who are you guys?" A Honda occupant said, " 'This is Flores.' " A truck occupant, a male, asked, " 'Well, who are you?' " and " 'Is that you, Cougar?' "

Police recovered from the intersection of Durfee and Kerrwood two nine-millimeter casings that had been fired from the same gun. Police found on the Honda's floorboard a spent bullet consistent with a nine-millimeter bullet. One bullet caused a mark on the Honda's driver's side door and another bullet caused three marks there. A bullet recovered from Vargas's body was consistent with a .45-caliber bullet.

Edward Garcia testified he used to be an 18th Street gang member. He had known appellants for years. Garcia talked with Nishijima about her involvement on the night leading to the shooting of Snoopy. Garcia testified Nishijima told him that after she arrived at Ojinaga's residence, Nishijima called people, including Pena. Nishijima also told Garcia that when she was at Ojinaga's residence, "somebody said to her, 'Fuck Puente.' " Nishijima further told Garcia that after she left the apartment, she called people and spoke to Pena.

Two or three days after the Vargas murder, Garcia went to Pena's house. Appellants were outside and appellants and Garcia conversed. Renteria brought up the topic of "the war between Flores and [Blackwood]." Garcia testified Renteria said, " 'It's about time we got one of them fools.' That he got his get back – that [Pena] got his get-back." Garcia testified Pena said, " 'I got that fool.' " After Garcia refreshed his memory with a detectives' report of their interview of Garcia, Garcia further testified concerning statements made by each appellant.[4]

Garcia testified he told police that Pena said he had leaned against the car and shot. Garcia also told police that appellants said it was "[Renteria, another person], and [Pena] that went out." Nishijima testified that the Thursday after the shooting, she and Renteria drove to Sacramento but later returned.

On December 4, 2008, police searched a residence relating to Pena, i.e., his mother's house. Police found in the garage a gun safe containing guns. Police also found ammunition in a backyard shed, including a nine-millimeter bullet and two .45-caliber bullets.

b. *Evidence Presented Only to Pena's Jury*.

Ojinaga testified that, the morning after the shooting, she called Pena to find out how his Hollywood trip had gone. Pena said they had had fun and had returned perhaps around 2:00 or 3:00 a.m. Detective Biddle testified Ojinaga told Biddle that "Pena asked about the shooting first and told her some details of the shooting, regarding a phone call."

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[4] After refreshing his memory, Garcia testified as follows concerning what was said during appellants' conversation. Renteria said only, "That it's about time he got . . . one of them fools for having him lose his leg." Pena said, " 'It's about time I get one of them motherfuckers.' " The prosecutor asked Garcia if Pena said he did something, or just said, " 'It's about time I do something[?]' " Garcia replied, " 'That I got one of those motherfuckers.' " Garcia then gave conflicting testimony as to whether Renteria said, " 'Drop that fool.' " Garcia later testified as follows. Renteria said, " 'It's about time he got that get-back for that motherfucker -- got his get-back for losing his leg.' " Pena then said, " '. . . It's about time I dropped that fool. I got that motherfucker . . . .' " Garcia specifically remembered Pena mentioned Snoopy to Garcia. Pena said Snoopy was from Flores.

(*Sic*.) Ojinaga also told Detective Biddle that Pena said, "somebody had called somebody in Puente" and told them Flores people were at Ojinaga's house.

On November 12, 2008, Pena initially indicated to detectives that he could prove he was in Hollywood during the shooting based on photographs from his cell phone. Pena later told detectives the phone was his brother's phone and any photographs had been erased when he changed carriers. Pena also told detectives he did not learn that Flores members were at Ojinaga's house, or about the shooting, until the next morning. Pena denied to detectives that he knew who had told him this information. On June 14, 2010, Pena, in jail, told his mother, ". . . I did not have a [expletive] cellphone that night. So it doesn't matter."

c. *Evidence Presented Only to Renteria's Jury*.

Nishijima testified when she spoke to Renteria before the Vargas murder, she asked Renteria by phone if he was going to return to Ojinaga's residence. She asked because Ojinaga had said "the boys" were going to return, and Nishijima did not want Renteria to return since other gang members, especially from Flores, would be there and anything could have happened to him. Renteria asked if they were inside or outside, and she said they were outside. Renteria said, " 'All right. I'm gone' " and hung up.

After detectives called and spoke with Nishijima the first time, she told Renteria they had called. Renteria told Nishijima to change her number and not talk with them. Nishijima asked what happened. Renteria told Nishijima the following. Renteria was told some Flores members were at Ojinaga's place. Some people who were claiming they were from Blackwood "needed to start putting in work and acting like they're from Blackwood." Renteria sent those people, including Pena, to Ojinaga's place to shoot at Flores members. Nishijima testified "putting in work" meant participating in gang activity and committing shootings. Nishijima also testified that when Renteria told her not to get involved with detectives, he asked her, " 'Can't you figure it out? They ran up on that fool and domed him,' shot him in the head?"

Garcia testified he and Renteria were in a motel room when Renteria received a call from Pena's family just after deputies had arrested Pena. Renteria later hung up and told Garcia that Pena had been arrested. Renteria said, " '. . . Fuck it. He [Pena] had to do what he had to do.' " Renteria also said Pena had gotten his revenge. Nishijima testified that a few days or weeks before her December 2008, arrest, Nishijima had seen Renteria with a .45-caliber gun. Detectives interviewed Renteria following his arrest. He initially denied to detectives that a couple of days after the shooting he went with Nishijima to Sacramento. He later told detectives that he went at that time to see his newborn sister.

Nishijima testified that on January 11, 2009, Nishijima was on a jail bus with Ruben Flores (Ruben), a Blackwood member. Ruben told Nishijima the following. Ruben and Renteria were on a jail bus and the two talked about whether Nishijima was going to take the stand. Renteria told Ruben to tell Nishijima not to take the stand; if she did take the stand, to "plead the Fifth;" and that Nishijima knew what she had to do.

Nishijima also testified Renteria sent letters to Nishijima while she was in jail. Renteria surreptitiously addressed the letters to Nishijima's cellmate who in turn gave them to Nishijima. One letter stated, "You need to fix shit in the hood 'cause you know what's going wrong. You know what I hate the most? People bumping their gums." Nishijima understood this to mean she needed to clean up statements she had made, she was not to testify, and she was not to talk to people, especially not to law enforcement personnel.

Another letter said, "I never talked shit or bite [*sic*] the hand that fed me, Jap." Jap was Nishijima's nickname. Nishijima had taken care of Renteria when he was younger. A postscript said, " 'Don't turn into a lame, 'cause you know one goes, all go down.' " Nishijima understood that to mean she should not become a snitch.

A third letter said, " 'I hope you keep it 129 percent G.' " Renteria also wrote, " 'Because I heard thing -- you know what I'm talking about. If one goes down, they all

go down.' " The term 129 percent was Blackwood's version of 100 percent, and G stood for gangster. The letter ended, " 'So remember what the homey said on the bus.' "

2. *Defense Evidence*.

In defense, Alexis Pena, Pena's cousin, testified Renteria was with her at a barbecue on the night Vargas was killed.

ISSUES

Renteria claims the trial court (1) erroneously admitted into evidence his statements that detectives obtained in violation of *Miranda*[5] and (2) erroneously denied his *Pitchess*[6] motion. Pena claims (1) the trial court erroneously admitted into evidence Garcia's testimony relating Renteria's statements that incriminated Pena, (2) the trial court erroneously permitted Garcia to refresh his recollection concerning appellants' conversation, (3) there was insufficient evidence to support Pena's convictions, and (4) there was insufficient evidence of premeditation and deliberation as to count 1.

DISCUSSION

1. *No Violation of Renteria's Miranda Rights Occurred*.

a. *Pertinent Facts*.

At 12:43 p.m. on December 4, 2009, Detective Biddle and Los Angeles County Sheriff's Detective Barry Hall interviewed Renteria at the station. The interview transcript reflects as follows. During the beginning of the interview, the following occurred: "[Hall]: Thank you. What's up, man? How ya doin'? [¶] [Biddle]: Sleeping? [¶] [Hall]: You okay? Were you asleep right now? . . . [You're] Richard, right? [¶] [Renteria]: Yeah." Renteria later said he became 18 years old in April.

After further exchanges (reflected on page 2 of the transcript[7]), the following occurred: "[Biddle]: And your last name is Renteria? [¶] [Hall]: And they call you

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5 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

6 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

7 References in parentheses to page numbers are to the pagination reflected in the interview transcript.

'Bush?' [¶] [Biddle]: Are you awake? So they call you 'Bush?' [¶] [Hall]: Is it 'Bush' or 'Bushy?' [¶] [Renteria]: That's my nickname."

The detectives later (on page 3) advised Renteria of his *Miranda* rights, then Biddle asked, "Do you understand all that?" Biddle then asked Renteria, "What do you think this is all about?" and Renteria replied he did not know. Later during the interview, Renteria indicated he stopped going to high school in the ninth grade, but he could read okay.

Still later (at page 20), Hall, who had written a report, asked Renteria if he wanted Hall to read it to Renteria or if Renteria wanted to read it. Renteria replied he did not know. Hall said, "whichever you want. It's easy." Renteria indicated since it was easy, Hall could read it. Hall then read (at pages 20 and 21) a report Hall wrote pertaining to the detectives' interview of Garcia.

Later (at pages 23 and 24) the detectives told Renteria that Garcia told detectives that Garcia had heard Renteria make statements in the presence of Pena. Renteria told detectives that Garcia was fabricating. After Hall indicated he would not tell anyone what Renteria told detectives, Renteria said, *"I just talked to an attorney, sir, because that's nonsense."* (Italics added.)

Later during the interview (at page 32), the following occurred: "[Hall]: Boy, you're really having to fish for your answers, man. I can tell that when you're looking around every time we ask you a question. [¶] [Renteria]: *Yeah, well, I'll just talk to my -- my* ____." (*Sic*; italics added.) Still later (at page 42), a colloquy ensued between Hall and Renteria, during which Renteria said, ". . . *I don't wanna talk no more, . . .*" (*Sic*; italics added.) We will later address Renteria's above three italicized statements.

On July 12, 2010, prior to trial, Renteria suggested statements he made during the interview should be excluded under *Miranda*. On July 14, 2010, the court indicated it had read the transcript and tentatively had found adequate the *Miranda* advisement. After the court asked Renteria if he wished to address that issue, Renteria's counsel

indicated the burden was on the prosecution "to show that it was voluntarily obtained." The court concluded the advisement was made and Renteria understood it.

Renteria then argued the detectives did not "clear[ly] obtain[] . . . a waiver" because the question " 'Do you understand all that?' " was ambiguous and Biddle did not expressly ask if Renteria understood his rights and was willing to talk to Biddle. The court found the *Miranda* advisement was adequate, Renteria impliedly waived his *Miranda* rights, the first two of the three previously italicized statements were ambiguous and not invocations of Renteria's *Miranda* rights, and the third statement was an invocation of his rights. The court denied Renteria's motion to suppress his statements.

There is no dispute any challenged statements by Renteria admitted into evidence occurred after Biddle asked, "What do you think this is all about?" and Renteria replied he did not know, but before Renteria's third previously italicized statement that the trial court concluded was an invocation.

b. *Analysis*.

Renteria claims the trial court erroneously denied his suppression motion because he did not make a knowing and intelligent waiver of his *Miranda* rights and each of the three previously italicized statements was an invocation of his *Miranda* rights. We conclude otherwise.

In *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*), the appellate court stated, "decisions of the United States Supreme Court have held an express waiver is not required where the defendant's conduct makes clear a [*Miranda*] waiver is intended. [Fn. omitted.] The question is not whether the proper form was used but whether the defendant voluntarily, knowingly and intelligently waived his Fifth and Sixth Amendment rights as delineated in *Miranda*. [Fn. omitted.] This question is answered by reviewing 'the totality of the circumstances' surrounding the interrogation." (*Id*. at pp. 988-989.)

There is no dispute detectives properly advised Renteria of his *Miranda* rights and he understood them. Renteria does not dispute he impliedly waived his rights once he

replied "I don't know" to Biddle's question, "What do you think this is all about?" Renteria concedes "an implied waiver of *Miranda* rights may be found when a suspect answers questions after acknowledging he understands his constitutional rights. [Citations.]" We accept the concession and conclude Renteria, by replying "I don't know," clearly intended to waive his *Miranda* rights and impliedly waived them at that time. (Cf. *People v. Whitson* (1998) 17 Cal.4th 229, 245-250; *Riva, supra*, 112 Cal.App.4th at p. 989.)

The remaining issues are whether Renteria's implied waiver was voluntary, knowing, and intelligent, and whether he later invoked his *Miranda* rights as he now urges. As the pertinent facts demonstrate, Renteria challenged the waiver on the sole ground the detectives did not obtain from him an express waiver. Renteria therefore waived the issue of whether his implied waiver of his *Miranda* rights was voluntary, knowing, and intelligent. (Cf. *People v. Michaels* (2002) 28 Cal.4th 486, 511-512.)

Even if the issue was not waived, the inquiry as to whether a *Miranda* waiver was voluntary, knowing, and intelligent has two components. First, the waiver must be voluntary in the sense it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. ". . . 'Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]' [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 501-502.) "If this review shows the defendant chose to speak with police after he was informed of his rights, understood the information he was given and was not tricked or coerced into surrendering those rights, a valid waiver will be implied. [Fn. omitted.]" (*Riva, supra*, 112 Cal.App.4th at p. 989.)

Renteria argues the trial court did not consider the totality of the circumstances because it did not consider the circumstances that Renteria was not alert when he was

taken to the interview room, the detectives asked questions about whether Renteria was asleep, Renteria was 18 years old at the time of the interview, he had dropped out of school in the ninth grade, and he opted for Hall to read the previously mentioned police report. Renteria cites the interview transcript as evidence of these circumstances. However, the trial court read the transcript and therefore considered any such circumstances. There was substantial evidence Renteria understood the *Miranda* advisements he was given and was not tricked or coerced into surrendering his *Miranda* rights. Renteria's implied waiver of his *Miranda* rights was valid. (*Riva, supra*, 112 Cal.App.4th at pp. 988-989.)

Finally, any invocation of *Miranda* rights after a defendant has waived them must be unambiguous and unequivocal. (*People v. Nelson* (2012) 53 Cal.4th 367, 376-378.) Renteria's two statements, "I just talked to an attorney, sir, because that's nonsense" and "Yeah, well, I'll just talk to my -- my ____" were not unambiguous and unequivocal invocations.[8] The trial court suppressed any statements Renteria made after he made the statement ". . . I don't wanna talk no more, . . ." i.e., a statement the trial court concluded was an invocation of his *Miranda* rights. No *Miranda* violation occurred.

2. *The Trial Court Properly Denied Renteria's Pitchess Motion.*

a. *Pertinent Facts.*

On April 8, 2010, Renteria filed a pretrial discovery motion pursuant to *Pitchess, supra,* 11 Cal.3d 531. The motion sought an order requiring, inter alia, the Los Angeles County Sheriff's Department (LASD) to make available "[a]ll complaints from any and all sources relating fabrication of evidence, perjury, dishonesty, bias or falsehoods" by Duval "in the giving of a gang expert[']s opinion as to whether or not a crime was committed for a gang purpose, and other opinions, testimony or police reports about gang

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[8] Although Renteria suggests his statement, "I just talked to an attorney" was erroneously transcribed, he made no motion to correct the record or have this court order the superior court to issue a settled statement about the alleged error. (See Cal. Rules of Court, rules 8.155(c), 8.340(c).) We presume the record is correct. (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1170, fn. 11.)

members that were untruthful concerning the relationship of [Blackwood] gangs with one another [*sic*] or other gangs, . . . any biased or dishonest statements made in his police reports or his testimony in court concerning suspected gang members and their reported activities of [wrongdoing], and any other evidence of misconduct amounting to moral turpitude . . . against [Duval]."

The motion also sought, inter alia, the names and addresses of all persons who had filed such complaints, might be witnesses, or had been interviewed by LASD, and sought related documents and information. The motion's sole supporting declaration was that of Renteria's trial counsel, Henry Bastien.

Bastien's declaration stated, in relevant part, as follows. On August 29, 2008, Vargas was shot and killed while driving on Durfee with Delgado and Ortiz. The three were members of, or affiliated with, Flores. The People's theory was appellants, Blackwood members, killed Vargas because Flores and Blackwood were rivals that had been feuding for at least 15 years, and, in August 2007, a Flores member had seriously wounded Pena. The People supported their theory by having Duval "testif[y] as a gang expert that the killing was committed by the Blackwood gang" because of said long-standing feud and as revenge for the assault on Pena.[9]

The declaration then stated, "It is the defense position that the two gangs were not longstanding enemies during the past 15 years. They do not share a common border and the territory of the situs of the crime, Durfee Ave in El Monte, was not under dispute or

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[9] Bastien's declaration does not state the proceeding at which Duval so testified. We note that at the preliminary hearing, appellants stipulated for purposes of that hearing that Duval was an expert in criminal street gangs and that Blackwood was such a gang for purposes of former section 186.22. At that hearing, Duval testified as follows. Duval had been a gang investigator for at least 15 and one-half years, and Flores and Blackwood had been enemies for at least that long. The gangs did not share a common border and their territories were at least a couple of miles apart. If Blackwood members entered El Monte, shot at Flores members driving in a car, and killed one, the killing would have been committed for the benefit of Blackwood. Durfee was in El Monte and territory claimed by Flores. Flores was the only gang that claimed the area around 4110 Durfee.

coveted territory by Blackwood. Also, there was not a continuing war among the two gangs and they were not rivals during that entire time. [¶] Rather the detective's expert opinion was an exaggeration or untruth of the respective gang's hostility status made to buttress the prosecution[']s case that the crime was committed by the defendants for a gang purpose." The declaration indicated Renteria would use the sought discovery to obtain impeachment evidence that Duval would provide false information, reports, and testimony pertaining to gang-related issues.

On April 22, 2010, during argument on Renteria's motion, Bastien urged, "we would hope to show through expert testimony that that rivalry did not exist and further that that opinion is without historical foundation and is a product of [an] adversarial situation as opposed to the realities of the dynamics between the two groups."

The court concluded Renteria failed to present a "specific factual scenario that is plausible" and failed to show good cause permitting an in camera hearing on the motion. The court also concluded all Renteria had done was to indicate, without support, his disagreement with Duval's expert opinion. The court denied Renteria's *Pitchess* motion without prejudice to Bastien submitting a supplemental declaration based on any future additional information he might learn. The record contains no such supplemental declaration.

b. *Analysis.*

In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*), our Supreme Court observed that, to initiate discovery under a *Pitchess* motion, the defendant must file a motion supported by affidavits showing good cause for the discovery. To show good cause, the defendant must, inter alia, present "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents. [Citations.]" (*Id*. at p. 1025.) *Warrick* held a plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense

proposed to the charges. (*Id.* at p. 1026.) We review a trial court's ruling on a *Pitchess* motion for abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

In the present case, Renteria's motion did not provide a police report, witness statements, or any declaration other than Bastien's. Renteria presented no specific factual plausible scenario of misconduct by Duval at the time of the Vargas killing, Renteria's arrest, or any other time prior to the filing of the felony complaint in this case. Duval's alleged misconduct was his gang expert testimony at an unidentified proceeding (assumably, appellants' preliminary hearing) that the Blackwood gang killed Vargas because of a long-standing feud and as revenge for the assault upon Pena. However, the sole basis for Renteria's argument that misconduct occurred was Bastien's mere representation, as Renteria's advocate, that Duval's testimony was false or exaggerated.

In fact, Duval testified at the preliminary hearing that the two gangs did not share a common border and the Durfee crime site was not in disputed gang territory. Bastien said the same thing in his declaration, a fact suggesting he obtained this information from Duval and conceded Duval's testimony was truthful at least to that extent. That essentially left Bastien's bare representation the two gangs were not longstanding enemies during the past 15 years (a representation expressly disputing the length of time, but not the fact, the gangs were longstanding enemies). Bastien's asserted "hope" that he would show through expert testimony at trial that the two gangs were not longstanding enemies during the past 15 years provided no support for the pretrial motion. Renteria failed to demonstrate good cause for the discovery or a specific factual plausible scenario of misconduct by Duval. The trial court did not abuse its discretion by denying Renteria's *Pitchess* motion.

3. *The Trial Court Properly Admitted Renteria's Statements as Evidence Against Pena.*

Appellants were jointly tried except they had separate juries. During direct examination, Garcia testified without objection as follows. One day in about September 2008, Garcia was conversing with appellants in front of Pena's house. Only five persons were in the area: Garcia, appellants, Pena's brother, and Alexis Pena. Garcia learned

about the murder when Renteria brought up the issue of the war between Flores and Blackwood. Additionally, "[Renteria] said, 'It's about time we got one of them fools.' That he got his get-back -- that [Pena] got his get-back."

Later, Garcia (after refreshing his memory over appellants' objection Garcia should not be permitted to refresh his recollection and change his testimony) testified that during the above conversation with appellants, Renteria said, "That it's about time he got . . . one of them fools for having him lose his leg."

Pena claims the trial court erroneously admitted into evidence Renteria's two above quoted statements in violation of the *Bruton*/*Aranda*[10] rule, and Pena's constitutional rights to confrontation, due process, and a fair trial. We conclude otherwise. Pena waived any *Bruton/Aranda* issue by failing to object below to Garcia's testimony on that ground. (*People v. Hill* (1992) 3 Cal.4th 959, 994-995.) Similarly, Pena waived any confrontation clause, due process, or fair trial issue by failing to object on those grounds. (Cf. *People v. Alvarez* (1996) 14 Cal.4th 155, 186; *People v. Benson* (1990) 52 Cal.3d 754, 786-787, fn. 7.)

Even if Pena did not waive those issues, the *Bruton/Aranda* rule is that the admission into evidence, against a nontestifying codefendant, of said codefendant's confession which also facially incriminates and is inadmissible hearsay as to a defendant violates the latter's right to confrontation when the confession is admitted into evidence at their joint jury trial. (*People v. Fletcher* (1996) 13 Cal.4th 451, 455-456; *Aranda, supra,* 63 Cal.2d at pp. 528-531; *Bruton, supra,* 391 U.S. at pp. 124-128, fn. 3, 129-136.) However, for the three reasons below, the rule is inapplicable and the trial court did not violate Pena's constitutional rights to confrontation, due process, and a fair trial.

First, appellants were jointly tried but had separate juries. Thus, any statement by the nontestifying codefendant Renteria was not admitted into evidence against Renteria

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10 *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476] (*Bruton*).

before Pena's jury. Renteria was not on trial before Pena's jury. No joint jury trial occurred.

Second, the admission into evidence of nontestimonial statements does not violate the *Bruton*/*Aranda* rule or a defendant's constitutional rights to confrontation or due process. (*People v. Arceo* (2011) 195 Cal.App.4th 556, 571-575 (*Arceo*).)[11] Pena concedes ". . . Renteria's statement was not testimonial and courts have held that under *Crawford* [*v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177]], the Confrontation Clause is applicable only to testimonial statements . . . ." We accept the concession.

In the present case, Pena has failed to demonstrate Renteria's challenged statements were made to a law enforcement officer. Pena does not suggest any of the five persons in the area when Renteria made the statements were law enforcement personnel. Renteria's challenged statements were not testimonial. (Cf. *People v. Cage* (2007) 40 Cal.4th 965, 984; *People v. Griffin* (2004) 33 Cal.4th 536, 579, fn. 19; *People v. Garcia* (2008) 168 Cal.App.4th 261, 291.)

Third, Renteria made the challenged statements during a conversation between Garcia and appellants; therefore, there was substantial evidence Pena heard and understood the statements. The statements incriminated Pena. A reasonable person in Pena's position having heard and understood the statements would have denied them at the time if they were false, and Pena failed to do so. That failure constituted an adoptive admission by Pena of the truth of Renteria's statements. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1189.) Since adoptive admissions are exceptions to the hearsay rule (Evid. Code, § 1221), Renteria's statements were not inadmissible hearsay as to Pena.[12]

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[11] To the extent *United States v. Mussare* (3rd Cir., 2005) 405 F.3d 161, suggests *Bruton* applies to nontestimonial statements, federal appellate court cases are not binding on this court. (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587.)

[12] In light of the above analysis, we reject Pena's claim his trial counsel provided ineffective assistance of counsel by failing to object to Renteria's statements.

4. *The Trial Court Properly Permitted Garcia to Refresh His Recollection.*

a. *Pertinent Facts.*

As indicated, during direct examination during his July 2010, testimony, Garcia testified without objection that one day in about September 2008, he conversed with appellants in front of Pena's house, Garcia learned about the murder when Renteria brought up the issue of war between Flores and Blackwood, and, during the conversation, "[Renteria] said, 'It's about time we got one of them fools.' That he got his get-back -- that [Pena] got his get-back."

Later, the prosecutor asked Garcia if Renteria said anything more. Garcia replied no and that he did not recall, and asked, "Can I read what I had said? [¶] It's been a while, you know." Garcia later testified Pena said " 'I got that fool.' " The prosecutor asked Garcia if Pena said anything else, and Garcia replied no and that he did not recall. Garcia testified Renteria told Garcia that Snoopy was the "one that was hit."

Garcia also testified his conversation with appellants occurred about three weeks before his September 26, 2008, arrest on a gun charge. Following Garcia's arrest and two years prior to trial, Garcia told detectives what Garcia had heard appellants discussing.

The following then occurred: "Q. [The Prosecutor]: You've indicated that today you're having some difficulty in remembering specifically what was said by [Pena] and [Renteria]? [¶] A. Yes. I remember. I just don't remember . . . what days. I don't remember exactly what days . . . when we had these conversations."

At sidebar, appellants argued Garcia was untrustworthy[13] and appellants objected that refreshing Garcia's recollection or "going into statements he made on a prior date so he can now change it" would be improper and violate appellants' due process and Sixth Amendment rights. Appellants argued Garcia was not having memory problems but was fabricating. Pena added a Fourteenth Amendment objection.

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[13] Appellants urged Garcia had led a gang lifestyle, was involved with the Mexican Mafia, provided information to police to save his life, and was implicated in a federal death penalty case.

The prosecutor indicated he wished to examine Garcia regarding his prior statements. The court concluded the record was insufficient to permit the court to rule on the issue of whether Garcia's credibility was so questionable it implicated due process; therefore, the court overruled appellants' "objection."

Later, Garcia testified before the jury as follows. Garcia spoke to detectives in September 2008, a few weeks after he spoke to appellants. Garcia's memory as to appellants' statements was better when he spoke to detectives than it was at time of trial. If Garcia looked at a copy of the report of his interview with detectives, it would "help [him] remember better" what he was trying to testify. Over continuing objections by appellants, the court permitted Garcia to read the report to himself to refresh his recollection. After Garcia read the report, the prosecutor asked if reading it brought anything back to Garcia's memory. Garcia replied yes and testified the report seemed accurate. Garcia then testified as indicated in footnote 4, *ante*.

b. *Analysis.*

Pena claims the trial court erred by permitting Garcia to refresh his recollection to testify about appellants' conversation. Pena argues there was no need for Garcia to refresh his recollection concerning the conversation because Garcia remembered it and the only thing Garcia did not remember was the date of the conversation.

Although appellants objected to Garcia refreshing his recollection, they did not do so on the ground he had only indicated he could not remember the date of appellants' conversation. Appellants objected on the ground Garcia was a completely untrustworthy witness, i.e., apart from whether he could or could not remember the date of appellants' conversation. Appellants waived the issue raised by their present claim. (Cf. *People v. Holt* (1997) 15 Cal.4th 619, 666-667; Evid. Code, § 353, subd. (a).)

Moreover, even if the issue was not waived, we reject Pena's claim. "A witness may refer to hearsay to refresh his recollection; however, before doing so the witness must testify he cannot remember the fact sought to be elicited." (*People v. Lee* (1990) 219 Cal.App.3d 829, 840 (*Lee*).) Pena concedes we review the trial court's ruling for

abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) We accept the concession.

During Garcia's testimony, he asked to read his prior statements, commenting, "It's been a while, you know." Garcia indicated he did not recall if Renteria or Pena said more than Garcia had testified either had said. Garcia testified it had been almost two years since he had talked with detectives.

It is true Garcia later appeared to indicate he remembered appellants' statements but not the days on which those statements were made. However, Garcia subsequently testified his memory as to those statements was better when he spoke to detectives in September 2008, than it was at time of the 2010 trial, and that if Garcia looked at a copy of the report of his interview with detectives, it would "help [him] remember better" what he was trying to testify. Based on that testimony, the trial court reasonably could have inferred Garcia was testifying that, because of the passage of time and to the extent he needed help to remember, Garcia could not remember his statements. The trial court properly permitted Garcia to refresh his recollection. (Cf. *Lee*, *supra*, 219 Cal.App.3d at p. 840; *People v. Gardner* (1957) 147 Cal.App.2d 530, 538-539.)

5. *There Was Sufficient Evidence Supporting Pena's Convictions and Sufficient Evidence of Premeditation and Deliberation as to the Offenses.*

Pena presents related claims as to the present offenses that there was insufficient identification evidence he was a perpetrator, and insufficient evidence of premeditation and deliberation.[14] We disagree. To summarize, there was substantial evidence as

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[14] "Deliberate" means arrived at as a result of careful thought and weighing of considerations for and against the proposed course of action, and "premeditated" means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123 (*Perez*).) "Premeditation and deliberation do not require an extended period of time, merely an opportunity for reflection." (*People v. Cook* (2006) 39 Cal.4th 566, 603.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) "[P]remeditation can occur in a brief period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived

follows. Prior to the Vargas murder, Flores members shot Pena, a Blackwood member. As a result, Pena used a prosthetic leg. A Blackwood member would retaliate by entering Flores territory to shoot a Flores member.

On the day of the murder, Flores members went to Ojinaga's apartment, and appellants were expected to return there. Nishijima, who associated with Blackwood, called appellants and told them Flores members had been present. Shortly after the Flores members, including Vargas, left, the crimes occurred in Flores territory. According to Garcia, Pena said Pena leaned against the Honda and shot. Vargas, a defenseless Flores member, was shot and fatally wounded in the chest, a vital body part, during an unprovoked attack. After the crimes, someone from the truck told the Honda's occupants to identify themselves, a fact providing evidence the shooting was gang-related.

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at quickly . . . .' [Citations.]" (*Perez, supra,* 2 Cal.4th at p. 1127.) Premeditation and deliberation can thus occur in rapid succession. (*People v. Bloyd* (1987) 43 Cal.3d 333, 348.) *People v. Anderson* (1968) 70 Cal.2d 15, sets forth three categories of evidence, i.e., evidence of planning activity, prior relationship, and manner of killing, relevant to whether a defendant harbored premeditation. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019.)

The act of obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081-1082.) The method of killing alone can sometimes support a conclusion a murder was premeditated and deliberated. (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.) An execution-style shooting at close range with no bruises or lacerations on the victim that show a struggle may establish premeditation and deliberation. (*People v. Hawkins* (1995) 10 Cal.4th 920, 957 (*Hawkins*).) The assailant's use of a firearm against a defenseless person may show sufficient deliberation. (*People v. Bolin* (1998) 18 Cal.4th 297, 332-333.) Firing at vital body parts can show preconceived deliberation. (*Ibid*; *People v. Thomas* (1992) 2 Cal.4th 489, 517-518.) Other factors which may be considered include the nature of the wounds suffered, the fact the attack was unprovoked, the fact the deceased was unarmed, the fact the defendant hid evidence, and the fact the defendant failed to secure medical attention for the victim. (*People v. Clark* (1967) 252 Cal.App.2d 524, 529-530; *People v. Lewis* (1963) 217 Cal.App.2d 246, 259.)

A few days after the crimes, Pena made incriminating statements to the effect he had acted in revenge for having been shot in the leg. Pena told Ojinaga details about the shooting. He also provided conflicting statements as to whether, using a cellphone, he could prove he was in Hollywood at the time of the shooting, i.e., conflicts evidencing consciousness of guilt. There was sufficient evidence Pena was a perpetrator of the murder of Vargas and sufficient evidence the offenses were willful, deliberate, and premeditated.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.